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VHS of Michigan, Inc. d/b/a Detroit Medical Center (DMC) and Local 283, International Brotherhood of Teamsters (IBT). Case 07–CA–205394

March 11, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On July 23, 2019, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its overtime pay policy. The judge failed to address, however, the Respondent’s argument that this matter should be deferred to the parties’ contractual grievance-arbitration procedure. The Respondent timely raised the deferral defense in its answers to the complaint, and fully set forth its argument in favor of deferral in its post-hearing brief.¹ Deferral is a threshold issue which must be decided prior to addressing the merits of the allegations at issue. See *United Hoisting & Scaffolding, Inc.*, 360 NLRB 1258, 1260 (2014). We accordingly address at the outset the Respondent’s deferral defense and find, for the reasons set forth below, that deferral is appropriate here.

The Union represents a unit of laboratory workers at the Respondent’s Detroit Medical Center. For about 16 years the Respondent has paid unit members overtime for any shift that exceeded 8 hours, regardless of how many hours they worked weekly. On June 23, 2017, the Respondent changed its policy to pay overtime only if an employee worked more than 40 hours per week. There is no dispute that the Respondent made the change without giving the Union notice or an opportunity to bargain. The change was made while the parties were in negotiations for a successor collective-bargaining agreement and while the previous agreement remained in effect pursuant to the parties’ arrangement.

¹ See *Hospitality Care Center*, 314 NLRB 893, 894 (1994) (“[D]eferral is an affirmative defense that can be waived if not raised timely . . . it

At the time of its change to the overtime pay policy, the Respondent asserted a contractual defense: that Article VII of the parties’ collective-bargaining agreement, addressing overtime and scheduling, privileged the Respondent’s unilateral conduct. The Union thereafter filed unfair labor practice charges challenging the change, but it did not invoke the parties’ grievance-arbitration procedures.

The use of grievance-arbitration procedures to resolve disputes is favored as a matter of national labor policy, and the Board has considerable discretion to defer to those processes when doing so will serve the fundamental aims of the Act. See *UPS*, 369 NLRB No. 1, slip op. at 2–3 (2019); *Wonder Bread*, 343 NLRB 55, 55 (2004). Under the settled test for determining whether prearbitral deferral is appropriate, the Board considers six factors: (1) whether the dispute “arose within the confines of a long and productive collective-bargaining relationship”; (2) whether there is a “claim of employer animosity to the employees’ exercise of protected rights”; (3) whether the agreement provides for arbitration “in a very broad range of disputes”; (4) whether the arbitration clause “clearly encompass[s] the dispute at issue”; (5) whether the employer asserts its willingness to resort to arbitration for the dispute; and (6) whether the dispute is “eminently well suited to resolution by arbitration.” *San Juan Bautista Medical Center*, 356 NLRB 736, 737 (2011) (quoting *United Technologies Corp.*, 268 NLRB 557, 558 (1984)) (alteration in original).

Applying these factors, we agree with the Respondent that deferral is appropriate. The parties have had a bargaining relationship for at least 13 years, have reached successive collective-bargaining agreements, and have successfully invoked the contractual grievance-arbitration mechanism to resolve disputes. The Respondent has indicated its willingness to utilize the grievance-arbitration process to resolve the instant overtime dispute and to waive any procedural objections.

The parties’ grievance-arbitration procedure clearly encompasses the instant dispute. Article VI of the parties’ collective-bargaining agreement provides for arbitration in a very broad range of disputes, including “matters of interpretation and application” of the provisions of the agreement. Here, the Respondent argues that its change in overtime policy is privileged by Article VII of the agreement, whereas the General Counsel argues that Article VII does not grant such authority to the Respondent.

Further, the overtime dispute here is eminently well suited to resolution by arbitration. “A dispute is well

is sufficient if the defense is raised either in the answer or at the hearing.” (emphasis in original).

suit to arbitration when the meaning of a contract provision is at the heart of the dispute.” *Mercy Hospital*, 366 NLRB No. 165, slip op. at 20 (2018). The Respondent argues that its contractually reserved right under Article VII to change employees’ work schedules² encompasses a right to change its method of overtime payment because the Fair Labor Standards Act (FLSA) defines overtime in the health care industry by employee work schedules.³ The General Counsel counters that Article VII is silent as to method of payment of overtime. The interpretation of Article VII is thus at the “heart of the dispute” here. *Id.* The overtime dispute is amenable to grievance-arbitration because Article VII is not unambiguous as to method of overtime payment, and the Respondent has advanced a plausible construction of the contract supporting its position. See *Faro Screen Process, Inc.*, 362 NLRB 718, 724 (2015).

We have carefully considered the General Counsel’s contention that deferral is inappropriate because the parties’ collective-bargaining relationship has recently deteriorated into animosity. In support of his position, the General Counsel points to the several unfair labor practice charges filed recently as well as the parties’ failure to reach a successor collective-bargaining agreement. We note, however, that the parties settled the filed charges and have continued to meet and bargain toward reaching an agreement. As a result, we conclude that the parties’ bargaining relationship remains functional, and we do not share the General Counsel’s concerns about the fairness or availability of the grievance-arbitration procedure.⁴

Having considered all the relevant factors, we find that deferral of the parties’ dispute concerning the change in overtime pay is appropriate. We are satisfied that the parties’ grievance-arbitration procedure may be relied on to function properly and to resolve the overtime dispute fairly.⁵

ORDER

IT IS ORDERED that the complaint is dismissed, provided that the Board retains jurisdiction of this proceeding for the limited purpose of entertaining an appropriate and

timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.

Dated, Washington, D.C. March 11, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Robert A. Drzyzga, Esq., for the General Counsel.
Shaun P. Ayer (The Allen Law Group, PC), of Detroit, Michigan,
 for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, ADMINISTRATIVE LAW JUDGE. This case was tried in Detroit, Michigan, on June 4, 2019. Teamsters Local 283 filed the charge in this matter on August 29, 2017. The General Counsel issued a complaint on March 29, 2018.

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) in changing the circumstances under which employees in the bargaining unit covering laboratory assistants and customer service representatives would be paid overtime.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

² Art. VII, Sec. 1(A) of the parties’ contract provides in pertinent part:

Recognizing that the provisions of health care services may require regular work on seven days per week, the regular work schedule for a full-time employee shall consist of eighty (80) hours per 2-week period and eight (8) hours per workday. The Employer reserves the right to change the regular work schedule to forty (40) hours, per week.

³ Under the FLSA, hospitals and residential care establishments may utilize a fixed work period of 14 consecutive days in lieu of the 40-hour workweek for the purpose of computing overtime. Employers applying this “8 and 80” exception must pay time and one-half the regular rate for all hours worked over 8 in any workday and over 80 in the 14-day period. See 29 U.S.C. Sec. 207(j).

⁴ Although one overtime dispute remains, that is insufficient to establish the type of animosity toward employees’ exercise of protected rights that would be considered sufficient to warrant rejecting deferral. Cf. *Kenosha Auto Transport Corp.*, 302 NLRB 888, 888 fn. 2 (1991) (“[I]n determining whether to defer an 8(a)(5) allegation, [the Board] will consider whether there is a claim of employer animosity to the employees’ exercise of protected rights,” such as an alleged 8(a)(3) violation.).

⁵ In light of our decision to defer, we find it unnecessary to pass on the judge’s finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Detroit Medical Center (DMC), a corporation, operates hospitals at its facilities in Detroit, Michigan where it derived gross revenues in excess of \$250,000 in 2018. During 2018, DMC purchased and received goods and materials valued in excess of \$5000 directly from points outside of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Teamsters Local 283, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

For at least 16 years, members of the DMC bargaining unit covering senior laboratory assistants, laboratory assistants, and customer service representatives have been paid overtime (time-and-a-half) for any shift that exceeded 8 hours, regardless of the number of hours worked in a week. These employees are members of one of three bargaining units represented by Teamsters Local 283.

At a meeting with union stewards on June 23, 2017, Jonita Edwards, the human resources director for DMC, announced that effective July 9, 2017, Respondent would be making a change in its pay practices. After July 9, employees would only be paid overtime if they worked more than 40 hours a week. These changes are set forth in detail in (GC Exh. 10). Respondent made it clear that it believed it did not have to give the Union advance notice of this change or give the Union an opportunity to bargain over it. Melissa Berger, one of the union stewards, asked Edwards how DMC could make such change without the presence of union Business Representative Steve Hicks, the Union's lead negotiator in collective bargaining.¹ Edwards replied that the DMC could make such a change unilaterally to conform to the policies of Tenet Healthcare, its parent company.²

At the time of the change DMC and the Union were in negotiations for a successor agreement to their January 1, 2012-December 31, 2014 collective-bargaining agreement. This agreement has been extended every 45 days since its expiration and is currently still in force. While the parties disagree as to whether the extension has been continuous, they agree that the contract was in force at the time the overtime calculation changed in June-July 2017.

Respondent contends that it was entitled to unilaterally make this change pursuant to Article 7, Section 1(A) of the collective-bargaining agreement. That provision states:

Recognizing that the provisions of health care services may require regular work on seven days per week, the regular work schedule for a full-time employee shall consist of eighty (80) hours per 2-week period and eight (8) hours per workday. The

Employer reserves the right to change the regular work schedule to forty (40) hours, per week. This schedule may be Monday through Friday or various alternate seven-day operations schedules with four (4) days off, within the two-week period, for full time employees.³

This language has been in each of the collective bargaining agreements between the parties since January 1, 2006, G.C. Exhs. 2, 3, and 4. Article 7, Section 4 of the collective-bargaining agreement covers overtime, but does not and has not since January 1, 2006, specifically addressed the conditions upon which overtime will be paid. Nothing in the contract states how many hours in a day, week, or pay period an employee must work to be entitled to overtime pay. As stated previously, since 2006 until July 9, 2017, unit employees were paid overtime if they worked more than 8 hours in any shift, regardless of the number of hours worked in a week or bi-weekly period. Nevertheless, Respondent contends that Section 1(A) allows it to cease paying overtime to unit employees who work over 8 hours in a single shift despite the fact that it had been consistently doing so for 11 years.

ANALYSIS

An employer violates Section 8(a)(5) and (1) of the Act if it makes a material unilateral change in the terms and conditions of employment during the course of a collective-bargaining relationship on matters that are mandatory subjects of bargaining, *NLRB v. Katz*, 369 U.S. 736, 743 (1962). A change in a long-standing method of calculation of when employees are eligible for overtime pay is a mandatory subject of bargaining, *Chef's Pantry*, 274 NLRB 775, fn. 6 (1985). An employer that makes a change in this method unilaterally, violates Section 8(a)(5) and (1) of the Act, *Intermountain Rural Electric Association*, 305 NLRB 783, 787-88 (1991).

I conclude that the Board's decision in *Intermountain Rural Electric Association* is dispositive of this case. Intermountain had an established practice of computing eligibility for overtime pay for all hours for which an employee was compensated, including vacation and sick leave. In 1980, Intermountain succeeded in changing the contract language to require employees to make-up paid time off before being paid at the premium overtime rate. According to the contract, employees became eligible for overtime pay only if they worked more than 8 hours a day or 40 hours per week. Despite this change in the contract, Intermountain continued to pay the overtime rate for all hours for which employees were compensated. In 1989, Intermountain unilaterally ceased this practice and refused to pay overtime rates unless an employee actually worked 40 hours a week or a full 8-hour day. The Board found this to be an illegal unilateral change.⁴

An employer's practices, even if not required by a collective bargaining agreement, which are regular and longstanding,

¹ Hicks testified that he did not find out about the change until July 13, 2017, at a bargaining session.

² Tenet purchased DMC from Vanguard Health sometime prior to 2014.

³ This provision is consistent with Sec. 7(j) of the Fair Labor Standards Act, which has special provisions for the health care industry.

⁴ The Board reversed the judge's conclusion in *Intermountain* that the Union had waived its bargaining rights over this change. In the instant case, Respondent argues that the language of the collective-bargaining agreement (or its interpretation of the contract language) constitutes a waiver of the Union's bargaining rights. This argument is foreclosed by the *Intermountain* decision. An established past practice supersedes contract language that is inconsistent with it.

rather than a random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective bargaining representative notice and an opportunity to bargain over the proposed change, *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *B & D Plastics*, 302 NLRB 245, fn. 2 (1991); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001); *Sacramento Union*, 258 NLRB 1074, 1075-1076 (1981). During negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain, it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for an agreement as a whole, *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) enf. 15 F.3d 1087 (9th Cir. 1991). Respondent does not contend that an overall impasse was reached on or prior to July 9, 2017. Respondent's longstanding and consistent practice of paying unit employees the overtime rate when they worked more than 8 hours in a shift is such a term and condition of employment that cannot be changed unilaterally.

CONCLUSION OF LAW

Respondent, VHS of Michigan violated Section 8(a)(5) and (1) of the Act by unilaterally changing its policies as to when unit employees were eligible for overtime pay.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these Findings of Fact and Conclusions of Law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, VHS of Michigan, Inc., d/b/a Detroit Medical Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing its policies as to the eligibility of employees for overtime pay.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request of the Union, restore its established past practice with regard to eligibility for overtime pay, e.g., paying time-and-a-half for any hours worked in excess of 8 in one shift.

(b) Before implementing any changes in the wages, hours, and other terms and conditions of employment of unit employees, notify and upon request, bargain collectively and in good faith with the Union, Teamsters Local 283 as the exclusive bargaining representative of its senior laboratory assistants, laboratory assistants, and customer service representatives. During collective bargaining negotiations refrain from making implementation of any unilateral changes unless and until an overall impasse has been reached on bargaining for an agreement as a whole.

(c) Make whole unit employees for any loss of pay or other benefits they may have suffered as a result of the unlawful conduct in the manner set forth in *Ogle Protection Services*, 183 NLRB 662, 683 (1970), enf. 444 F.2d 502 (6th Cir. 1971) with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Detroit, Michigan facilities copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 9, 2017.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 23, 2019

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."